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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/754,205	01/05/2001	Daniel Gelber	XMP 2033	3339

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EXAMINER

WITZ, JEAN C

ART UNIT	PAPER NUMBER
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1651

DATE MAILED: 11/05/2003

6

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/754,205

Applicant(s)

GELBER ET AL.

Examiner

Jean C. Witz

Art Unit

1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-130 is/are pending in the application.
- 4a) Of the above claim(s) 5,6,8-11,25-65,70-71,73-76 and 90-130 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-4,7,66-69 and 72 is/are rejected.
- 7) ☒ Claim(s) 12-24 and 77-89 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

Election/Restrictions

This application contains claims directed to the following patentably distinct species of the claimed invention:

Species 1: Claims 12-24 and 77-89, drawn to a cough suppressant and an immune booster.

Species 2: Claims 25-37 and 90-102, drawn to a cough suppressant and an antioxidant.

Species 3: Claims 38-41 and 103-106, drawn to a cough suppressant and a cough reflex sedating agent.

Species 4: Claims 42-48 and 107-113, drawn to an expectorant and an immune booster.

Species 5: Claims 49-56 and 114-121, drawn to an expectorant and an antioxidant.

Species 6: Claims 57-58 and 122-123, drawn to an expectorant and a cough reflex sedating agent.

Species 7: Claims 59-65 and 124-130, drawn to a decongestant and a cough reflex sedating agent.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 1-11 and 66-76 are generic.

Once one of the species above are elected, then, if the nutraceutical recited in the elected species is either an immune booster or an antioxidant, Applicant is required under 35 U.S.C. 121 to elect a single disclosed subspecies of either the immune booster or antioxidant nutraceutical for prosecution on the merits to which the claims shall be restricted if no generic nutraceutical species claim is finally held to be allowable.

For the immune boosters, the individual species are recited in claim 8.

For the antioxidants, the individual species are recited in claim 9.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over

the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

During a telephone conversation with Arlir Amado on or about October 1, 2003, a provisional election was made with traverse to prosecute the invention of Species 1, Claims 12-24 and 77-89, drawn to a cough suppressant and an immune booster, and the immune booster subspecies of Echinacea. Affirmation of this election must be made by applicant in replying to this Office action. Claims 5,6,8-11,25-65,70-71,73-76 and 90-130 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Allowable Subject Matter

Claims 12-24 and 77-89 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Species 1, reciting a cough suppressant and an immune booster, is free of the prior art. The next species to be examined was Species 2, reciting a cough suppressant and antioxidant. This species was found to be disclosed in the prior art as evidenced below. At this time, examination was concluded.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

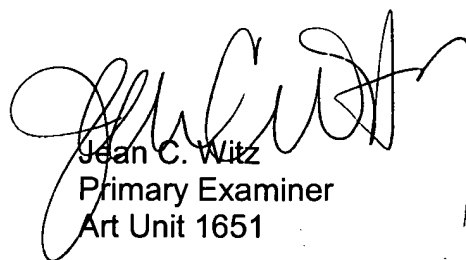
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Claims 1-4, 7, 66-69, 72 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by JP 2000212100 or JP 08325145, which disclose composition for treatment of immune responses of the respiratory systems which contain dextromethorphan and either green tea powder or ascorbic acid.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jean C. Witz whose telephone number is (703) 308-3073. The examiner can normally be reached on 6:30 a.m. to 4:00 p.m. M-Th and alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9307 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.


Jean C. Witz
Primary Examiner
Art Unit 1651

November 4, 2003